

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION FOR APPROVAL) CASE NO. 2006-00136
OF THE INDIRECT TRANSFER OF)
CONTROL RELATING TO THE MERGER)
OF AT&T, INC. AND BELLSOUTH)
CORPORATION)

**XSPEDIUS MANAGEMENT COMPANY SWITCHED SERVICES, LLC'S AND
XSPEDIUS MANAGEMENT COMPANY OF LOUISVILLE, LLC'S
RESPONSES TO JOINT APPLICANTS' DATA REQUESTS**

Xspedius Management Company Switched Services, LLC and Xspedius Management
Company of Louisville, LLC (collectively "Xspedius" or "Respondents"), by counsel, hereby submits
their Responses to the Data Requests propounded by AT&T, Inc., BellSouth Corporation and
BellSouth Telecommunications, Inc. (referred to herein collectively as the "Joint Applicants").

DATA REQUEST NO. 1: Does Xspedius agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the financial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondents' analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on all aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondents' analysis of the proposed merger's compliance with the statutory requirements of KRS 278.020(5) cannot be finalized without the information which has been requested through the Data Requests submitted by Respondents to the Joint Applicants in this docket. Thus, Respondents' response to Joint Applicants' Data Request No. 1 is subject to further evaluation and modification. Subject to the foregoing, and based on Joint Applicants' representations and public statements concerning the merger and other information currently available to Respondents, it is foreseeable that AT&T will have the financial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5) should the proposed merger between the Joint Applicants be authorized by the Commission and the transaction consummated and implemented as currently proposed.

DATA REQUEST NO. 2: If the response to Request No. 1 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See Respondents' Response to Data Request No. 1 above.*

DATA REQUEST NO. 3: Does Xspedius agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the technical ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondents' analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on all aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondents' analysis of the proposed merger's compliance with the statutory requirements of KRS 278.020(5) cannot be finalized without the information which has been requested through the Data Requests submitted by Respondents to the Joint Applicants in this docket. Thus, Respondents' response to Joint Applicants' Data Request No. 3 is subject to further evaluation and modification. Subject to the foregoing, and based on Joint Applicants' representations and public statements concerning the merger and other information currently available to Respondents, it is foreseeable that AT&T will have the technical ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5) should the proposed merger between the Joint Applicants be authorized by the Commission and the transaction consummated and implemented as currently proposed.

DATA REQUEST NO. 4: If the response to Request No. 3 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See Respondents' Response to Data Request No. 3 above.*

DATA REQUEST NO. 5: Does Xspedius agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the managerial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondents' analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on all aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondents' analysis of the proposed merger's compliance with the statutory requirements of KRS 278.020(5) cannot be finalized without the information which has been requested through the Data Requests submitted by Respondents to the Joint Applicants in this docket. Thus, Respondents' response to Joint Applicants' Data Request No. 5 is subject to further evaluation and modification. Subject to the foregoing, and based on Joint Applicants' representations and public statements concerning the merger and other information currently available to Respondents, it is foreseeable that AT&T will have the managerial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5) should the proposed merger between the Joint Applicants be authorized by the Commission and the transaction consummated and implemented as currently proposed.

DATA REQUEST NO. 6: If the response to Request No. 5 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See Respondents' Response to Data Request No. 5 above.*

DATA REQUEST NO. 7: Does Xspedius agree that the merger of AT&T, Inc. and BellSouth Corp. is being made in accordance with the law pursuant to KRS 278.020(6)?

RESPONSE: No, the proposed merger of AT&T, Inc. and BellSouth Corp. is not being made in accordance with the law pursuant to KRS 278.020(6) for the same reasons that the merger is not consistent with the public interest. *See* Respondents' Response to Data Request No. 11 below.

DATA REQUEST NO. 8: If the response to Request No. 7 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See* Respondents' Responses to Data Request Nos. 7 and 11.

DATA REQUEST NO. 9: Does Xspedius agree that the merger of AT&T, Inc. and BellSouth Corp. is being made for a proper purpose pursuant to KRS 278.020(6)?

RESPONSE: No, the proposed merger of AT&T, Inc. and BellSouth Corp. is not being made for a proper purpose pursuant to KRS 278.020(6) for the same reasons that the merger is not consistent with the public interest. *See* Respondents' Response to Data Request No. 11 below.

DATA REQUEST NO. 10: If the response to Request No. 9 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See Respondents' Responses to Data Request Nos. 9 and 11.*

DATA REQUEST NO. 11: Does Xspedius agree that the merger of AT&T, Inc. and BellSouth Corp. is consistent with the public interest pursuant to KRS 278.020(6)?

RESPONSE: Respondents' analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on all aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondents' analysis of the proposed merger's compliance with the statutory requirements of KRS 278.020(6) is preliminary. Respondents' positions and supporting facts will be explained more fully in the testimony and analysis submitted in accordance with the procedural schedule in this proceeding and after the information requested through the Data Requests submitted by Respondents to the Joint Applicants in this docket has been provided. Thus, Respondents' response to Joint Applicants' Data Request No. 11 is preliminary and subject to further evaluation and modification.

Subject to the foregoing, and based on Joint Applicants' representations and public statements concerning the merger and other information currently available to Respondents, it is unlikely that the proposed merger is in the public interest, as required by KRS 278.020(6). The proposed merger between AT&T and BellSouth will further solidify AT&T's dominance as the nation's largest local exchange carrier and will make it all that more difficult for the Commission to open Kentucky's local markets to competition. Competitive markets, and the attendant benefits of lower prices, increased customer choice, and new products and technologies, are clearly in the public interest. A merger that

reduces such competition is plainly not in the public interest. As recently as the Commission's proceedings evaluating barriers to local competition required by the *Triennial Review Order*, BellSouth was naming both AT&T and SBC as its competitors in the local market.¹ There is an unambiguous reduction in competition caused by the continuing concentration of local markets through AT&T's sequential acquisition of the major components of the former Bell System.

The Commission must critically review the effect of this concentration on conditions in Kentucky, including in its review the prior characterizations offered by the Joint Applicants. Consider:

- * "Other voice-over-IP providers, including established companies like AT&T . . . are currently offering voice-over-IP services to even greater numbers."²
- * "Wireless service also now competes directly against traditional wireline service."³
- * "[T]he three incumbent interexchange carriers – AT&T, MCI, and Sprint – have traditionally dominated the provision of services to enterprise customers."⁴
- * AT&T competes against BellSouth using dark fiber.⁵

¹ Kentucky Public Service Commission Case No. 2003-0379.

² UNE Fact Report, prepared and filed on behalf of BellSouth and SBC *et. al.*, WCB Docket No. 04-313, at I-1.

³ UNE Fact Report at I-2.

⁴ UNE Fact Report at I-6.

⁵ UNE Fact Report at III-18.

* AT&T competes against BellSouth using fixed wireless.⁶

The effects of this merger are not limited, however, merely to the harms created by the elimination of AT&T as a competitor to BellSouth. The Commission must also consider the practical effects on its efforts to establish local competition that will result from the post-merger AT&T/BellSouth enjoying an unprecedented geographic footprint across which it will be uniquely positioned to offer multi-location customers discounts and other pricing plans that cannot be matched by any competitor that is not similarly the cumulative product of the merger of Regional Bell Operating Companies around the country. The combined company will also be able to terminate calls within its footprint at cost, while other carriers continue to pay non-cost-based access charges to complete the same calls. While there may be actions that the Commission can take to mitigate the competitive harms of the merger -- for instance, the more open the local network, the less it can be exploited as a competitive advantage by the post-merger entity -- keeping the local network open will become even more difficult in the face of the sustained opposition from a post-merger carrier with the resources that will be enjoyed by AT&T/BellSouth.

As Respondents indicated at the outset, their analysis of the merger is underway and ongoing. Respondents intend to fully explain their concerns and potential mitigating actions (if any) that the Commission can adopt once we have concluded our review. Even a preliminary

⁶ UNE Fact Report at III-24.

analysis demonstrates, however, that this merger will produce less choice, greater concentration and higher prices. Obviously, these results are not in the public interest and the merger should, therefore, not be approved.

DATA REQUEST NO. 12: If the response to Request No. 11 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: *See Respondents' Response to Data Request No. 11 above.*

DATA REQUEST NO. 13: State with specificity all facts and contentions that underlie Xspedius' statement in its Motion to Intervene that "[t]his case involves issues which are directly relevant to Xspedius' business and on-going operations." *Motion to Intervene*, paragraph 2.

RESPONSE: BellSouth, through its operating subsidiaries, is both a supplier and competitor to each of the Respondents in the Kentucky market. Likewise, AT&T, through its operating subsidiaries, is a competitor to Respondents in the Kentucky market. It is self-evident that the wholesale remonopolization of local phone service in this jurisdiction which will occur if the proposed merger is authorized will profoundly effect each and every customer and competitor of the Joint Applicants, especially those customers and competitors that will be, in whole or in part, reliant upon the network owned and/or controlled by the Joint Applicants to provide competitive services to Kentucky residents. *See also*, Respondents' Response to Data Request No. 11 above.

DATA REQUEST NO. 14: State with specificity all facts Xspedius expects to “develop . . . that will assist the Commission in full consideration of the proposed transaction.” *Motion to Intervene*, paragraph 3.

RESPONSE: The facts and issues which Respondents seek to develop, and which are vital to the Commission’s statutory analysis of the Joint Applicants’ proposed merger, are reflected in the Data Requests submitted by Respondents to the Joint Applicants in this docket. Without Joint Applicants’ disclosure of the facts and documents requested for production pursuant to such Data Requests, the Commission cannot complete the full statutory review of the proposed transaction required by Kentucky law. Moreover, Respondents intend to further develop these matters in the Pre-filed Testimony which will be tendered on its behalf. *See also*, Respondents' Response to Data Request No. 11 above.

DATA REQUEST NO. 15: Does Xspedius agree with Paragraph 33 of the Joint Application set forth below:

33. Nor will the wholesale obligations of BellSouth's operating subsidiaries under interconnection agreements and orders of this Commission be affected by the merger. BellSouth's subsidiaries operating in Kentucky will still be bound to those agreements and orders post-merger closing to the same degree as before the merger, and all performance standards and other regulatory requirements that currently apply to BellSouth operating subsidiaries will be unaffected by the merger.

RESPONSE: No. Although the merger does not unilaterally change the legal framework addressing BellSouth's wholesale obligations and does not abrogate the terms of an effective interconnection agreement, existing interconnection agreements expire and must be renewed. The arbitration process effectively privatizes the regulation of wholesale services with the competitive entrants whose limited resources must be used to resolve substantive and competitively significant issues with the incumbent. Although the Commission is the ultimate arbiter of wholesale disputes, the resources needed to challenge complex cost studies, operational impediments and the incumbent's persistent efforts to dilute wholesale obligations must be borne, in the first instances, by the competitive industry.

The AT&T/BellSouth merger will further exacerbate the resource imbalance that advantages the incumbent in the arbitration process. The relative cost to enforce and protect the entrant's wholesale

rights must be spread across a dramatically lower revenue base than those of the incumbent. Thus, while legal obligations in *theory* may not change, the *practical*

Xspedius' Responses to Joint Applicants'
Initial Data Requests
Case No. 2006-00136
Data Request No. 15
Page 2

consequence of the merger will be to create an even greater resource imbalance, the results of which will make it even more difficult to achieve commercially viable interconnection relationships with BellSouth.

DATA REQUEST NO. 16: If the response to Request No. 15 is anything other than an unqualified “yes,” state with specificity each and every fact that supports Xspedius’ response.

RESPONSE: See Respondents' Response to Data Request No. 15 above.

Submitted to and filed with the Kentucky Public Service Commission this 11th day of May,
2006.

Respectfully submitted,

/s/ Henry S. Alford

Henry S. Alford
Scot A. Duvall
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
(502) 584-1135
halford@middreut.com

COUNSEL FOR XSPEDIUS
MANAGEMENT COMPANY SWITCHED
SERVICES, LLC AND XSPEDIUS
MANAGEMENT COMPANY OF
LOUISVILLE, INC.

CERTIFICATE OF SERVICE

Counsel for Respondents Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC hereby certifies that a true and accurate electronic copy of this filing was transferred to the Commission via the Electronic Filing Center this 11th day of May, 2006 and filed in hardcopy document form with the Commission also on the 11th day of May, 2006. Further, consistent with the Commission's Order of April 12, 2006, notice of the filing of this Motion was served via electronic mail on all parties of record. Parties of record can access the information at the Commission's Electronic Filing Center located at <http://psc.ky.gov.efs/efsmain.aspx>.

/s/ Henry S. Alford

COUNSEL FOR XSPEDIUS
MANAGEMENT COMPANY SWITCHED
SERVICES, LLC AND XSPEDIUS
MANAGEMENT COMPANY OF
LOUISVILLE, INC.